Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL–CIO (Perini Corporation) *and* John Johnson. Case 20–CB–8373

January 10, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On May 30, 1991, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order.

Lucile L. Rosen, Esq., for the General Counsel.
Lawrence B. Miller, Esq., of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried on March 14, 1991,[1] at San Francisco, California. The charge was filed by John Johnson, an individual, on May 31, 1990 against Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL–CIO (Respondent or Union). On July 30, 1990, the Regional Director for Region 20 of the National Labor Relations Board issued a consolidated complaint and notice of hearing against Respondent alleging Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act.

Specifically, it is alleged Respondent refused to reregister John E. Johnson on its preferred out-of-work list in May 1990 without affording him and similarly situated registrants due process for it failed to give notice of its intent to modify the manner in which the rule was applied.

Respondent's timely filed answer to the complaint admits certain allegations, denies others, and denies any wrongdoing.

All parties were given full opportunity to appear and introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Based on the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent's answer to the complaint admits, and I find, Perini Corporation (Employer) meets one of the Board's jurisdictional standards and the Union is a statutory labor organization.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Findings of Fact*

The principal facts in this case are undisputed. Respondent operates an exclusive hiring hall. Soon after the enactment of the Taft Hartley Act in 1987, Respondent formed job placement regulations based on seniority. In the early 1960s Respondent drafted hiring regulations which provided for a preferred list in its job placement regulations to provide for registrants who had been injured on the job and needed jobs that required less physical skill or were otherwise easier to perform. The Respondent's job placement regulations were incorporated in applicable collective-bargaining agreements, which are in effect from 1989 through 1993[2] which provide for preferred registration as follows:

> 04.10.03 An Employee making a Preferred registration shall:
>
> (a) be ineligible to register and shall not register for work in any classification which is not Preferred and
>
> (b) be fifty-five (55) or more years of age and have had at least ten (10) years of employment or availability for employment in any one or more classifications set out in Section 01.00.00 of this Agreement on the type or kind of craft work covered by this Agreement in Northern California.
>
> (c) Be a Class A Employee who does not meet such requirements above, but who furnishes a doctor's certificate stating such Employee is unable to perform his normal work for a period of six (6) months or more preventing his employment in any classification except one which is Preferred *or* a Class A Employee who acquired a physical handicap as a result of an industrial accident while employed as an Operating Engineer, which prevents his employment in any classification except one which is Preferred, shall be permitted to so register. [Emphasis added.]

Respondent's dispatch manual, which bears an issue date of June 1, 1985, as here pertinent, required the registrant es-

[1] All dates are in 1990 unless otherwise indicated.

[2] It appears this version of the Respondent's regulations went into effect on or about September 6, 1983, pursuant to a letter sent to all district representatives, business representatives, and dispatchers. The parties stipulated the preferred list provisions were amended in 1983 to provide that industrial accidents also must prevent an individual's ''employment in any classification except one which is preferred,'' and to require a doctor's certificate.

tablish their ''handicapped'' status which is to be determined by the dispatcher from the information provided by the out-of-work registrant. The manual provides, in part:

> Section 04.10.03(c) requires that the ''physical handicap'' must prevent an individual's employment ''in any classification except one which is preferred'' so that an individual seeking preferred registration for that reason should present a letter from a physician or other sufficient evidence substantiating that he has a physical handicap which prevents his employment in all classifications except those that are preferred. If a dispatcher believes that the individual is capable of working in a classification other than those on the Preferred List, that matter should be referred to the district representative for disposition.
>
> If the district representative also believes that the individual does not meet the requirements of 04.10.03, the individual should be so advised and told that he has a right to appeal the determination to the job placement regulations committee.
>
> A medical certificate of continued disability may be required in either instance in ''(c)'', above.

The Charging Party, John Johnson, apprenticed with Respondent in 1967, left the Union that year, and returned ''around 1970.''[3] John Johnson is not yet 55 years old.[4] From 1970 to 1985, he operated backhoes, loaders, dozers, cranes, and rollers. In 1985 John Johnson was hospitalized because he ''was drinking too much from over-stress at the job.'' When he was released from the hospital in 1985, he obtained a doctor's letter[5] and was registered by Respondent on the preferred list. Respondent avers their placement of John Johnson on the preferred list was a mistake. General Counsel does not claim Respondent acted in a discriminatory manner in this case. It is undisputed placement on the preferred list increases the registrants' chances of being dispatched. According to the unrefuted testimony of Ted Wright, Respondent's district representative in San Francisco, it is desirable to be on the preferred list because: ''there's probably more—in San Francisco, there is more elevator operating jobs probably than there is anything else. And it pays a lot of money. And there are job opportunities, because they are early—they usually go to work before anybody else and they are the last ones on the job.''

Based on another letter from Dr. Berge dated May 3, 1987, John Johnson was again registered on the preferred list. The letter provides:

> Mr. John Johnson has continued to be under my care for medical problems since 1985. Because of the nature of his problems and treatment needs it is recommended that he remain on *light duty* for an indefinite period of at least twelve months. He will be re-evaluated at the end of that time. [Emphasis added.]

Johnson was dispatched on June 16, 1987.

On March 25, 1988, John Johnson again registered on the preferred list and was dispatched the same day. John Johnson did not have a current doctor's letter and was informed he needed one by Ted Wright, pursuant to instructions from the Respondent's district representative. Another letter was provided by Dr. Berge dated April 13, 1988.[6] On November 23, 1988, John Johnson again registered, providing a letter from Dr. Berge dated November 2, 1988. There were two letters from Dr. Berge dated November 2, 1988. One letter did not bear a union-received stamp and the other was stamped as received December 15, 1988. Respondent contends the letter which does not mention stress was received by the Union on November 21, 1988, but there was no evidence adduced to support this claim. The letter with the received stamp is the only one that mentions stress-related issues. This letter provided:

> Mr. John Johnson continues to be under my care for medical problems. He was examined today, November 2, 1988, and I have recommended that he remain on *light duty* for an indefinite period due to *stress* related issues. He will be re-evaluated in six months. [Emphasis added.]

On December 12, 1988, John Johnson submitted to Respondent a letter from William I. Perry, Ph.D, a clinical psychologist, indicating John Johnson, since November 16, 1988, was under his care for psychological problems; receiving weekly ''psychotherapy for stress-related problems'' as an outpatient. Dr. Perry also recommended John Johnson remain on light duty for at least 6 months.

Respondent claims, without merit, that this is the first time the Union was notified John Johnson ''had only a 'stress related' impairment and no physical handicap.'' Dr. Berge's November 25, 1985 letter mentioned John Johnson should remain in low stress situations and avoid the stress of operating heavy equipment. Dr. Berge always ended his letters by stating he was always available to answer any questions. Also, in his November 2, 1988 letter, Dr. Berge again mentioned ''stress'' as being related to John Johnson's medical problems. Also, the dispatchers that placed John Johnson on the preferred list since 1985 did not appear and testify. There was no claim they were unavailable. There is no evidence Respondent lacked knowledge John Johnson's disability was stress related.

Respondent admits on brief when it initially registered John Johnson on the preferred list:

> In retrospect, the District Representative should have ascertained that the impairment and stresses referred to

[3] John Johnson was initiated into Respondent in September 1972.

[4] John Johnson's birth date is November 6, 1945.

[5] The letter, written by Jeremy J. Berge, M.D., a specialist in internal medicine, stated:

> Mr. John Johnson has been under my care from April 17, 1985 until the present for medical problems which required hospitalization and extensive rehabilitation.
>
> Mr. Johnson is making good progress in his recovery. However, it is important that he remain in a *low stress* situation at present. It is recommended that he return light-duty work for a period to avoid the demands and stresses of operating heavy equipment. He will require *light-duty* work for a period of at least six months. Mr. Johnson will be capable of returning to full work capacity in the future and I will notify you at such time of his complete medical release. [Emphasis added.]

[6] This letter provided:

> Mr. John Johnson continues to be under my care for medical problems. He was examined today, April 13, 1988, and I have recommended that he remain on *light duty* for an indefinite period. He will be re-evaluated in six months. [Emphasis added.]

were mental rather than physical and refused to put Johnson on the Preferred List. Further Johnson indicated on an attached affidavit that his problem was mental, but this apparently went unnoticed or the significance did not register with the then District Representative, Hank Munroe, who had never before or since dealt with a request for Preferred List registration based on mental impairment.

Hank Munroe did not appear and testify, there is no basis to find Munroe did not notice or attach any significance to John Johnson's affidavit. It appears John Johnson's request was the only one Respondent received based on stress rather than a physical impairment. According to Tom Stapleton, Respondent's business manager, and a long-term employee who knew the history of the establishment of the preferred list, the terms stress or mental impairment were not discussed.

After receiving the letters from Perry and Berge in December 1988, Respondent's dispatcher and district representative determined John Johnson could not register on the preferred list because he did not have a physical handicap. Initially, the dispatcher is charged with interpreting the Union's job placement regulations, then the district representative, and the final arbiter is the job placement regulations committee as set forth in the job placement regulations.

Sharon Meadows, who was a court-ordered compliance monitor pursuant to a consent decree which involved minorities receiving the appropriate amount of work, interceded on behalf of John Johnson, who is a black man. Respondent agreed to permit John Johnson to register on the preferred list even though he did not have a physical handicap. In the winter of 1988 or the spring of 1989, John Johnson again sought to register on the preferred list and Respondent again refused because he was not physically handicapped. John Johnson again sought the assistance of Sharon Meadows who met with Munroe, the San Francisco district representative, and the then-business agent, Ted Wright. After this meeting, John Johnson was again permitted to register on the preferred list.

Ted Wright admitted Respondent took the ''position at that time and said that if he wasn't a physical disability that he—you know, he shouldn't be allowed to be signed up on the Preferred List.'' However, since Meadows represented ''minorities weren't getting enough hours, and that we should go ahead and let John get dispatched out, and how come we were holding him back from being dispatched on the Preferred List,'' Respondent dispatched him from the preferred list. Respondent does not claim it informed John Johnson or any other registrant of its interpretation of the preferred list regulations as barring individuals who had stress related disabilities or other medical problems they did not characterize as a physical disability.

On May 1, 1989, John Johnson again registered on the preferred list. There was no doctor's letter but May 1 was within 6 months of December 12, 1988. There was no testimony concerning why Respondent permitted John Johnson to register on the preferred list on May 1. John Johnson again registered on July 25, 1989, without a new letter. July 25 was about 6 weeks past the 6-month period, thus, the December 12, 1988 letter may not have been the basis for permitting his registration on the preferred list this date. There was no testimony from any union representative with direct knowledge concerning why John Johnson was permitted to register on the preferred list on July 25.

The exhibits indicate John Johnson reregistered on the preferred list within 85 days after July 25, pursuant to section 04.10.19 of the Job Placement Regulations. Although the exact date of this registration was not a matter of record, there is no dispute John Johnson was timely; he presented a letter from Dr. Perry dated September 30, 1989, which provided:

> This is to certify that Mr. John Johnson has been receiving psychological services from me for treatment of a stress-related mental disorder.
>
> I have been seeing Mr. Johnson since November 16, 1988, for conditions arising during and subsequent to his most recent employment.
>
> I is my opinion that Mr. Johnson still suffers from a stress-related depression with anxiety and would benefit from further treatment.
>
> Please do not hesitate to contact me if I can be of further help.

Apparently on the basis of this letter, Respondent dispatched John Johnson from the preferred list on January 4, 1990, and he reregistered on January 8, 1990, without losing his position on the out-of-work list due to the short length of the job. On March 29, 1990, John Johnson was again dispatched from the preferred list to the same employer as January 4, 1990.

On April 19, 1990, Johnson tried to register,[7] submitting the September 30, 1989 letter from Dr. Perry. John Johnson was informed by the dispatcher, Jaime, the letter was out-of-date. John Johnson went to Dr. Perry and got another letter, which was dated April 20, 1990. This letter was presented to Respondent on April 24, 1990, and provides:

> This letter is regarding Mr. John Johnson . . . who was under my care for stress related disorders from 11–16–88 through 09–13–19. He was seen by myself weekly for psychotherapy sessions.
>
> Please note that termination of treatment was forced due to Mr. Johnson's having exhausted his insurance benefits and his lack of personal funds to pay for continued services himself. While significant progress was made over the course of treatment, the problems precipitating his treatment were not sufficiently resolved and to the best of my knowledge remain obstacles to Mr. Johnson's overall adaptive functioning. Based on my work with Mr. Johnson as well as having kept in sporadic touch since treatment terminated, it is my opinion that he could benefit from additional psychotherapy.
>
> It is also my opinion, due to his unresolved psychological problems and length of time since participating in the work force, that he be placed in a *light duty* situation initially if and when he does return to work. This

[7] The superintendent of Perini Construction Corporation offered John Johnson a job and gave him a dispatch letter. John Johnson took the letter to the Respondent's hiring hall and it was then he was advised he needed a current doctor's certificate.

> would offer the best hope for long-term success as an employee. [Emphasis added.]

When John Johnson presented this letter to the dispatcher, Jaime, he was not placed on the preferred list, but he was told by Jaime he would have to show the letter to Ted Wright.[8] John Johnson did not want to wait and talk to Wright.[9] The letter was left with Jaime with the understanding it would be shown to Wright. John Johnson then called Sharon Meadows.

Jaime referred the matter to Wright who referred the matter in turn to Miller, Respondent's house counsel. Wright's concerns were:

> the fact that he hadn't seen John for some time. That it didn't have anything in there about a physical disability, or that he could be off for six months.
>
> He would be off for more than six months, and perform work in his normal duties.

Miller and Wright referred the issue to the business manager, Tom Stapleton, for a final decision.

Stapleton did not consider the doctor's letter of April 20, 1990, sufficient to permit John Johnson to register on the preferred list because: ''For one thing, there is no physical disability or handicap. There's nothingthat says he is not capable of working in the classifications that he normally works in. And third, even though it met those requirements, I don't know what a light duty situation is.'' Stapleton also had a conversation with Wright and Miller concerning the May 18, 1990 letter, which he found would not have qualified John Johnson for the preferred list, even if he had a medical problem, a physical handicap. According to Wright: ''The conversation was that according to this letter, that it didn't look like there was anything wrong with John Johnson, that he was free to go to work on anything but the Preferred List.'' Respondent also noted the last two doctors' letters indicated John Johnson had not seen a doctor for more than six months, consequently, he may not have been properly evaluated. There is no evidence John Johnson was informed of any of the reasons given by Stapleton in his testimony, other than the doctor's letter was inadequate.

Wright informed Jaime, the dispatcher, that John Johnson did not meet the criteria for the preferred list but he was free to sign up on the regular list and to so inform John Johnson. Jaime telephoned John Johnson and left a message on his answering machine that the doctor's letter was not sufficient to permit his registering on the preferred list but he could register on the regular list. Jaime also told John Johnson that he could register on any list other than the preferred list. There is no evidence John Johnson was ever informed of the specific deficiencies in his submission. John Johnson did not register on any other list. Respondent did not inform John Johnson prior to the call from Jaime, that he would no longer be permitted to register on the preferred list; there was no notice circulated or posted informing members stress related or mental illnesses would not qualify for registration on the preferred list.

Sharon Meadows arranged for a meeting with herself, John Johnson, Lawrence E. Miller, Respondent's house counsel, and Ted Wright. Shortly after the meeting commenced,[10] John Johnson walked out because, according to John Johnson, ''What I remembered later on was, you [Miller and/or Respondent] were telling me what I could do. And the letter was stating what I couldn't do. So I figured we weren't getting anywhere with this meeting, so I got up and left.''

Dissatisfied with the Union's ruling, John Johnson filed a grievance. The issue was referred to the job placement regulations committee. According to James W. Eaton, a committee member and employee of the Associated General Contractors of California as industrial relations director charged with enforcing and administering various labor agreements, the committee decided John Johnson was not eligible to register on the preferred list. The basis of this decision were:

> We listened to the testimony of both the grievant and the union, and then reviewed what was in paragraph C. The committee decided that it was not presented evidence that Mr. Johnson could not perform work on whatever equipment he was eligible for.
>
> Furthermore, he had not suffered an industrial accident which led to a handicap. Again, the language is rather specific on that issue.
>
> There was no evidence that he was incapable of performing classifications for which he was qualified over the next six months.
>
> Again, just a very narrow reading of the language.

The committee considered the precedents where John Johnson had been referred from the preferred list for the past 5 years, but

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[8] Wright, as district representative, is required by Respondent's Dispatch Manual to resolve any issues concerning a registrant's eligibility to be placed on the preferred list. Wright, as a matter of routine, checked all registrants under the age of 55 who sought to be placed on the preferred list because the desirability of the placement led many unqualified individuals to attempt to be placed on the list.

[9] Although John Johnson claimed he did not get along with Wright, there is no evidence or claim Wright ever discriminated against John Johnson or gave him cause to suspect any such discrimination. Wright did not share John Johnson's opinion that they ''did not get along very well.'' I find the evidence does not support a claim Wright or any representative of Respondent held any animus against John Johnson for any reason.

[10] During his testimony, John Johnson claimed he stayed at the meeting 5 to 10 minutes, but his affidavit, dated June 11, 1990, indicated he remained at the meeting only a minute or two. According to Ted Wright:

> We were going to try to resolve some of the issues that were out there. John sat down—you started out with a statement, I believe, that ''I understand that you are a good operator.''
>
> John stood up at that time and said, ''That's not the issue here.'' And he walked out.
>
> Q. Then what happened?
>
> A. Sharon Meadows went after him to try to bring him back. And she couldn't bring him back.
>
> And Sharon came back in, and we discussed the problems with John going on the preferred list.

I credit Wright's testimony based on his demeanor, which appeared more forthright and open. Another factor leading to this finding is Wright demonstrated a facility to recall facts greatly superior to the ability displayed by John Johnson for recollection. Further, Wright's version is more closely aligned to John Johnson's affidavit, which was given at a time closer to the events. Johnson did not attempt to reconcile the difference between his affidavit and testimony.

quite frankly, we were baffled and did not understand how Mr. Johnson was referred out, if he was indeed referred out, under the identical conditions earlier. And we felt that it was simply a mistake and an error. And a couple of reasons for that.

The first thing is that when you go back to the language in here and it talks about a physical handicap, we all understand that.

We understand what a physical handicap is. We can measure it, we can see it, we can determine how a man can perform or a woman can perform.

When you get into the stress area, all of a sudden you put the management people on quicksand. We have no basis to determine anything.

And when someone is operating heavy equipment, whether it is an outside elevator, temporary elevator, whether it is repairing compressors, whether it is running a forklift or any of the other things that might be considered on this Preferred List.

Any errors of judgment by the operator become a major safety hazard on a project. So it is customary among 75 contractors to try to make some accommodation to those men and women who have been injured in the industry.

Positions of the Parties

In summary, Respondent's argument is it operated its referral system appropriately and lawfully because John Johnson did not meet the criteria for registering on the preferred list for these reasons: (1) the April 20, 1990 letter from Dr. Perry is clearly insufficient; (2) the Dispatch Manual requires the registrant have a physical handicap, Johnson's was mental. The regulations require the registrant be ''unable to perform his normal work,'' and Dr. Perry requests a ''light duty situation'' but fails to state John Johnson could not perform regular duties available if he was not on the preferred list; (3) Dr. Perry's last two letters fail to state John Johnson would be unable to perform work ''for a period of six (6) months or more''; (4) Respondent also argues operating an elevator is more stressful than operating a backhoe or bulldozer, so Dr. Perry's last two letters fail to indicate John Johnson's impairment obviated his employment in any classification except one which is preferred.

I find the claim the operation of an elevator is more stressful than operating other machinery to be without merit. Stapleton testified he had never operated an elevator but was told by some elevator operators in 1983, who were interested in optimizing their overtime which the Union proposed be cut from double time to time-and-one-half, while the task is not a physical problem it has a lot of stress. This self-interested hearsay testimony, I conclude, is insufficient to support the important claim operating an elevator is more stressful than operating a backhoe or bulldozer. The parties agreed many registrants tried to get on the preferred list because the jobs available to them were highly desirable particularly elevator operator. If physically handicapped individuals could perform these jobs, they can appropriately be considered ''light duty'' situations. Johnson was repeatedly dispatched to elevator operating jobs from the Preferred List; supporting a conclusion even Respondent considered it a ''light duty'' position.

Counsel for General Counsel asserts Respondent unlawfully refused to permit John Johnson's continued registration on the preferred list for it failed to give him and other job applicants proper notice of the Union's intention to modify the method of applying the preferred list rules and regulations, thereby denying them due process. Counsel for General Counsel claims the regulations are, at best, ambiguous, and permitted John Johnson to apply and be placed on the preferred list for about 5 years, and then, without notice, Respondent changed its interpretation of the rules. Where a hiring hall rule is ambiguous, the Union must provide job applicants with adequate notice of any rule change and Respondent failed to do so in this case.

According to counsel for General Counsel, the failure of the Union to provide John Johnson with prior notice of the change in registration rules for the preferred list constitutes a lack of due process and violates the Act, citing *Operating Engineers Local 406 (Ford Bacon & Davis)*, 262 NLRB 50 (1982). The rule change was significant and the change was arbitrary, thereby breaching the Union's duty to fairly represent job applicants ''by keeping them informed of matters critical to their employment status,'' in violation of Section 8(b)(1)(A) of the Act, citing *Plumbers Local 392 (Kaiser Engineers)*, 252 NLRB 417 (1980).

Analysis and Conclusions

In operating an exclusive hiring hall ''since a union has such comprehensive authority vested in it when it acts as the exclusive agent of users of a hiring hall and because users must place such dependence on the union that there necessarily arises a fiduciary duty on the part of the union not to conduct itself in an arbitrary,[11] invidious, or discriminatory manner when representing those who seek to be referred out for employment by it.'' *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 908 (1985). As noted by the Board in *Boilermakers Local 374 (Construction Engineering)*, 284 NLRB 1382, 1383 (1987), ''it has been repeatedly held that once a union embarks on the operation of an exclusive hiring hall it must conduct the hiring hall in a fair and impartial manner. This code of acceptable conduct necessarily extends to the institution of any referral rules which the Union adopts in accord with contractual provisions. In other words, the referral rules themselves, including any referral grievance mechanism, cannot be discriminatory or arbitrary.'' *Laborers Local 304 (AGC of California)*, 265 NLRB 602 (1982).

In considering whether Respondent violated Section 8(b)(1)(A) of the Act, when the Union is acting in a statutory representative capacity, such as the operator of an exclusive hiring hall, it is prohibited from taking action against any employee upon considerations or upon the basis of classifica-

[11] Respondent refers to the Supreme Court decision in *Air Line Pilots Assn. v. Joseph E. O'Neill*, 91 C.D.O.S. 1967, a March 19, 1991 decision considering whether a Union's actions under the Railway Labor Act arbitrarily breached their duty of fair representation. I find this case inapplicable herein for the following reasons. Initially, the Union's actions involved contract negotiations where the test is ''far outside a 'wide range of reasonableness,''' id., not administration of contractual referral obligations by an exclusive hiring hall. There is no claim in the instant proceeding the Union acted arbitrarily. Also, as the Court noted ''National Labor Relations Act cases are not necessarily controlling in situations such as this one, which are governed by the Railway Act.'' Id.

tions that are irrelevant, invidious, or unfair. *Miranda Fuel Co*., 140 NLRB 181 (1962); *Plumbers Local 598 (Columbia Mechanical)*, 250 NLRB 75, 83 (1980). A wide range of reasonableness is allowed the statutory bargaining representative in serving the employee it represents, subject to good faith and honesty of purpose in the exercise of its discretion. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337–338 (1953).

As noted in *Plumbers Local 598 (Columbia Mechanical)*, supra at 83,

> Section 8(b)(1)(A) does not proscribe every act of disparate treatment or negligent conduct, but only those which, because motivated by hostile, invidious, irrelevant, or unfair considerations, may be characterized as ''arbitrary, discriminatory or bad faith conduct.'' *Vaca v. Sipes*, 386 U.S. 171 (1967). Section 8(b)(1)(A) prohibits unions from restraining or coercing employees in the exercise of the rights guaranteed in section 7 of the Act, subject to the proviso not here pertinent that unions may prescribe their own rules ''with respect to the acquisition or retention of membership therein.''

In this case, the interpretation of the hiring hall procedures for registering on the preferred list is in issue. Respondent can adopt reasonable interpretations of its hiring hall regulations. *Operating Engineers Local 181 (Raymond Construction)*, 269 NLRB 611, 628 (1984); *Boilermakers Local 40 (Envirotech Corp.)*, 266 NLRB 432 (1983).

I find the Union's regulations governing placement on the Preferred List do not clearly require the job applicant demonstrate he or she has a physical handicap. All the rule requires of registrants under the age of 55 is to furnish a doctor's certificate stating they are unable to perform their normal work for a period of 6 months or more preventing their employment in any classification except one which is preferred or a class A employee who acquired a physical handicap as a result of an industrial accident while employed as an operating engineer, which prevents his employment in any classification except one which is preferred. The rule appears to be written in the alternative, the employee is either over 55, or provides the doctor's certificate indicating their incapacitation for at least 6 months, or they were injured during and in the course of their employment as an operating engineer. John Johnson would qualify and was found to have qualified for about 5 years under the second criterion. However, it would not be construed as, per se, unlawful for Respondent to require an employee under this second criterion to be physically handicapped to qualify for registration on the preferred list.

The question therefore is whether Respondent violated its duty to employees by changing the manner it registered John Johnson, and perhaps other employees on the preferred list by requiring he be physically handicapped. It is not averred this interpretation is unlawful or unwarranted because of historical, discriminatory or other considerations, just that notice of the change should have been given prior to Respondent's refusal to place John Johnson on the preferred list for referral to Perini Corporation.

As the Board noted in *Cell-Crete Corp*., 288 NLRB 262, 264 (1988):

> even if we were to accept the judge's finding that Local 304 in fact changed its policy and practice of acquiescing in Cell-Crete's excessive by-name requests, we would find that such arbitrary departure from established exclusive hiring hall procedures was violative of the Act. A union which operates an exclusive hiring hall must represent all individuals seeking to utilize that hall in a fair and impartial manner. [E.g., *Boilermakers Local 169 (Riley Stoker Corp.)*, 209 NLRB 140, 149–150 (1974).] In this regard, the Board has held that notwithstanding the absence of specific discriminatory intent, ''any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant . . . inherently encourages union membership, breached the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (b)(2),'' absent demonstration of a legitimate justification. [*Operating Engineers Local 406 (Ford Construction Corp.)*, 262 NLRB 50, 51 (1982), enfd. 701 F.2d 505 (5th Cir. 1983), and see *Plumbers Local 392 (Kaiser Engineers)*, 252 NLRB 417 (1980)]. In addition, the failure to give timely notice of a significant change in referral procedures is a breach of a union's duty to represent job applicants fairly. [*Operating Engineers Local 406 (Ford Construction Corp.)*, supra, 262 NLRB at 51 (1982) enfd. 701 F.2d 505 (5th Cir. 1983).

As was the case of the employer in *Cell-Crete Corp*., supra, 288 NLRB at 264, the Union failed to adduce any evidence that it ever notified John Johnson or other job applicants that it was altering its practice of allowing John Johnson and perhaps others to register on the preferred list for stress-related disabilities or other nonphysical handicaps. ''The failure to give notice of such a change about a development critical to potential employment constituted a breach of the . . . [Union's] duty to represent an ¢employee fairly.'' Id. Respondent failed to adduce any evidence stress-related illness was harder to police than other illnesses. Doctors' certificates are still required as a condition precedent to registration on the preferred list and no specific policing or other problem was raised concerning this class of impairment. While contending stress-related illness was not contemplated when the regulations permitting registration on the preferred list were developed and implemented, there was no evidence there was a decision to specifically exclude this class of illness.

Some stress-related illness may be deemed by Respondent as warranting registration on the preferred list. As Tom Stapleton testified:

> Q. How about a heart attack, have a heart condition?
>
> A. If it effected their physical being, it probably was a consideration for the Preferred List, heart attack. The doctor says they physically wasn't able to function, heart attack would work.

There was no medical or other expert testimony distinguishing stress-related and other illnesses or other considerations warranting a finding the Union did not breach its fiduciary duty of fair representation when it changed its rules after 5 years of permitting John Johnson to register on the preferred list because of a stress-related illness, without first notifying John Johnson and other employees.

Respondent's claim the doctor's note failed to declare John Johnson would be incapacitated for at least the next 6

months and thus justified their refusal to permit him to register on the preferred list is also without merit. The Respondent has changed its application of the registration rules for the preferred list to clearly exclude stress-related illnesses. If the failure of the doctor's letter to mention the length of the incapacity was the only problem claimed by Respondent, then John Johnson could have sought a revised letter from his doctor, but the barring of stress-related illness from qualifying for the preferred list precluded John Johnson from attempting to rectifying this deficiency, and I cannot find on the basis of this record that the doctor would not have modified his certificate to indicate John Johnson was ill and in need of light-duty assignments. The term light duty is not shown to be alien in disability parlance, and it was readily understood by Respondent for the preceding 5 years it dispatched John Johnson from the preferred list.

Similar doctors' letters, or certificates, had previously been deemed sufficient by Respondent to permit John Johnson to register on the preferred list. To suddenly, and without notice, require more is also a change in established dispatch procedures. As previously found, Respondent's claim of mistake is without merit. Further, assuming arguendo, the 5-year history of permitting John Johnson to register on the preferred list was a mistake or in contravention of regulations, such a claim does not relieve Respondent from its obligation to give notice before altering the established, more liberal registration practice. See *Cell-Crete Corp*., supra.

I conclude Respondent failed to demonstrate the modification of its dispatch procedures was necessary to the effective performance of its dispatch duties. *Cell-Crete Corp*., supra at 264; *Electrical Workers IBEW Local 11 (Los Angeles NECA)*, 270 NLRB 424, 425 (1984).

I conclude Respondent Local 3 violated Section 8(b)(1)(A)[12] of the Act by altering the established hiring hall dispatching practice of permitting John Johnson and perhaps others to register on the preferred list because of stress-related rather than physical handicap and thereby denying John Johnson the opportunity to be employed by Perini Construction.

CONCLUSIONS OF LAW

1. Perini Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent and the Employer have been parties to collective-bargaining agreements whereby the Respondent operates an exclusive hiring hall for the referral of employees by Respondent to Perini and other employers.

4. Respondent violated Section 8(b)(1)(A) of the Act by changing its established hiring and dispatch procedures for registration on the preferred list without prior notice, resulting in denial of a dispatch of John Johnson to the employer.

5. This unfair labor practice affects commerce within the meaning of Section 2(6) of the Act.

[12] The complaint does not allege Respondent's action also violated Sec. 8(b)(2) of the Act and under the circumstances here present, I find it unnecessary to determine if Respondent also violated this section of the Act.

THE REMEDY

Having found Respondent has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(b)(1)(A) of the Act, I recommend that it cease and desist therefrom, and take certain affirmative action designed to remedy the unfair labor practice and to effectuate the policies of the Act.

Having found Respondent unlawfully modified its practice of allowing John Johnson to register on the preferred list because of his stress-related disability, altering its hiring and dispatch procedures without giving John Johnson and any other similarly situated employees notice of such change and resulting in the denial of a dispatch to John Johnson, I recommend Respondent be ordered to make John Johnson and any other similarly injured employees, whole for any loss of earnings and other benefits resulting from Respondent's unlawful actions. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and accrued to the date of payment, minus tax withholdings required by law.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL–CIO, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to refer applicants for employment in accordance with the hiring hall practices and procedures it established pursuant to its collective-bargaining agreement with Perini Corporation by changing its established hiring and dispatch procedures for registration on the preferred list without prior notice, resulting in the unlawful denial of a dispatch to John Johnson.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Refer applicants for employment with the established hiring hall practices and procedures and, if any change in interpretation is effected, notify the applicants prior to such change, and make John Johnson and any similarly adversely affected applicants whole for any loss of earnings and other benefits resulting from Respondent's unlawful actions, in the manner prescribed in the remedy section of this decision.

(b) Post at their business offices and other places where notices to their members are customarily posted copies of the attached notice, marked ''Appendix.''[14] Copies of the at-

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a

Continued

tached notice, on forms provided by the Regional Director for Region 20, shall be posted by the Respondent, after being signed by its authorized representative, shall be posted for 60 consecutive days in conspicuous places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, or covered by any material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent have taken to comply.

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to refer applicants for employment in accordance with the hiring hall practices and procedures we established pursuant to our collective-bargaining agreement with Perini Corporation by changing our established hiring and dispatch procedures for registration on the preferred list without prior notice, which resulted in the unlawful denial of a dispatch to John Johnson, and perhaps other employees similarly situated.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL operate our exclusive hiring hall in accordance with the practices and procedures set forth in our collective-bargaining agreement with Perini Corporation and notify you prior to any changes in interpretation of this collective-bargaining agreement.

WE WILL make John Johnson and any other employees similarly wronged by our unlawful action, whole for any loss of earning and other benefits resulting from our unlawful action, less any net interim earnings, plus interest.

OPERATING ENGINEERS LOCAL UNION NO. 3, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO